**THE INCLUSION AND EXCLUSION OF STUDENTS WITH DISABILITY RELATED PROBLEM BEHAVIOUR IN MAINSTREAM AUSTRALIAN SCHOOLS**

## Introduction

The enrolment of students with disabilities in mainstream schools, rather than 'special' schools, has been aspired to in Australia for at least two decades. The 2002 report of a Senate enquiry into the education of students with disabilities concluded that 'inclusive practices' had become the 'prevailing orthodoxy' in Australian schools (Australian Senate, 2002, p. 29). More recently, the National Disability Strategy 2010-2020 (Council of Australian Governments, 2011, p. 49) committed Australia to the goal of inclusion of students with disability in a 'high quality education system that is responsive to their needs'. Underpinning any 'right' to 'inclusion'[1] is the *Disability Discrimination Act 1992* (Cth) ('DDA') which has the object of ensuring 'as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community' (s. 3). The DDA is informed and enlivened by Australia's ratification of an array international rights instruments (s. 12(8)). It was amended in 2009 to acknowledge the newly ratified Convention on the Rights of People with Disabilities which explicitly stipulates in Article 24 that states parties shall 'ensure' that '[p]ersons with disabilities are not excluded from the general education system on the basis of disability'.

Australia's achievement of the goal of inclusion has proved difficult, however, in respect of people with disability related problem behaviour. Most disability discrimination in education cases which end up in court involve problem behaviour flowing from intellectual, psychiatric or behavioural disability. Such behaviour may be disruptive, stressful or even dangerous. It might be the impulsiveness of a person with Down's syndrome (See, e.g., *P*[2]) or Attention Deficit Hyperactivity Disorder (ADHD) (see, e.g., *Walker*, *Abela*), the problems with bowel control and regurgitation of a person with a developmental disorder (See, e.g., *L*), or most problematically, the unwilled violence of a person with brain damage (See, e.g., *Purvis*). In Australian anti-discrimination legislation, the protected attribute of disability (or, for some Acts, impairment) typically extends to disturbed or disturbing behaviour. For example, the DDA definition of disability covers 'a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour' (DDA s 4). Moreover, since 2009, the DDA definition has made it plain in s. 4 what the Courts

had acknowledged (See, e.g., *Purvis*) that a disability 'includes behaviour that is a symptom or manifestation of the disability'.

It is indicative, perhaps, of the controversy that has historically attended the inclusion of students with problem behaviour, that the first disability discrimination in education case to be litigated in Australia, brought under the *Anti-Discrimination Act 1991* (Qld), *L*, involved a student excluded from her mainstream school because of her disability related behaviour. The complainant failed to prove unlawful discrimination, but the case excited extensive media coverage and polarised public opinion on the issue of inclusion (see, e.g., Atkins, 1995; Butler, 1995; Oberhardt, 1995; Atkins, 1996; Butler, 1996). Two similar Queensland 'behaviour' cases, *P* and *K*, heard shortly after *L*, were also decided against the complainants. Recent disability discrimination in education cases, including *Walker* and *Abela*, have also concerned students excluded for problem behaviour. The issue still troubles school communities: teachers and administrators, parents of students with and without disability, and students.

A student who is refused enrolment at a mainstream school, or excluded from a mainstream school, may claim direct discrimination, 'less favourable treatment' (See, e.g., DDA s. 5). A student may also claim indirect discrimination if an unreasonable condition is imposed, with which he or she cannot comply and which has the effect of disadvantaging him or her (See, e.g., DDA s 6). Claims of indirect discrimination have been extrapolated, for example, from the blanket imposition of school codes of conduct. Proof of either direct or indirect discrimination has been difficult for students with disabilities manifesting as problem behaviour.

This chapter will consider the strategies for exclusion which the relevant case law reveals may be relied upon by schools when problem behaviour poses a health and safety risk or disrupts the learning of others. It will consider how the courts have narrowed the scope of any obligation to include students with disability related problem behaviour, through the manner in which they have interpreted and applied various aspects of anti-discrimination law: direct and indirect discrimination, the unjustifiable hardship exemption to unlawful discrimination, and the obligation upon education providers to make reasonable adjustment for students with disability.

The benchmark case in this area, and a primary focus of the chapter, is *Purvis*. In that case, the High Court of Australia controversially determined that a school could lawfully exclude a student with disability related problem behaviour, and to achieve that result, construed the test

for direct discrimination in a manner which has subsequently undermined the utility of an action for direct discrimination across the areas and attributes protected in Australian anti-discrimination law (Thornton, 2009). School 'code of conduct' indirect discrimination cases have also been defeated on the basis that the imposition of such a code is 'reasonable' (See, e.g., *M & C, Minns*). Further, in the event that a complainant should succeed in proving a prima facie case of direct or indirect discrimination, the unjustifiable hardship exemption will likely render such discrimination lawful (See, e.g., *L, K, P*).

The implementation of the *Disability Standards for Education 2005* (Cth) (DSE), a year after the decision in *Purvis*, was an opportunity for both schools and courts to revisit the issue of the accommodation of problem behaviour. The DSE impose on educationproviders, including schools, the obligation to make reasonable adjustment for students with disabilities. Reasonable adjustment, however, is also excused where a school can prove that it would cause unjustifiable hardship. Cases decided since the introduction of the DSE have not delivered any greater prospects of inclusion for students with problem behaviour (See, e.g., *Walker* and Abela).

Both Commonwealth and state laws prohibit discrimination on the basis of disability (or impairment) in the protected area of education. There is significant overlap between Commonwealth and State laws in respect of proof of discrimination and the exemptions which will render a prima facie case of discrimination lawful. Since the DDA was amended in 2009 to impose an institutional obligation to make reasonable adjustment for students with disability, the DDA, and the associated DSE, arguably offer superior protection to students with disability. Moreover, the effect of DDA s. 13(3A) is that the DSE, and its obligation to make reasonable adjustment, will override any inconsistent state law. As such, the law as stated in and applied under the DDA and the DSE will be the primary focus of this chapter. Discrimination complaints may still be brought under state legislation, however, and relevant case law from the state courts will also be addressed.

## ***Purvis v New South Wales*: direct discrimination and problem behaviour**

The *Purvis* case, as the only directly relevant High Court case, is a logical place to begin an explanation of the complexities of the relevant law. It represents the most complete examination of the inclusion issue by an Australian court to date. The complainant in *Purvis*, Daniel Hoggan, was excluded from Year 7 at South Grafton High School, in New South Wales,

because of what a witness neurologist described as his 'difficult' behaviour, 'disinhibited and uninhibited' behaviour (paras. [29], [182]). Daniel's behaviour was caused by and a consequence of brain damage sustained during infancy as a result of an infection with encephalitis. Over the course of his enrolment in Year 7, Daniel was suspended several times and ultimately excluded for repeated verbal abuse and violence which included kicking not only furniture and school bags but also other children and teaching staff. A majority of the High Court held that Daniel's exclusion did not offend the DDA.

*Purvis* and the 'right' to inclusion

Four of the Justices on the Court, Chief Justice Gleeson CJ (para [6]), Justices McHugh and Kirby (para. [123]) and Justice Callinan (para. [238]), made some explicit comment on whether and to what extent there is a right to a 'mainstream' education available to students with disabilities. There is a measure of overlap in the analyses of these four judges, despite the fact that Justices McHugh and Kirby ultimately found, in a minority judgment, that Daniel Hoggan had been the subject of unlawful discrimination. All four implied that the source of any right to inclusion could be traced to the international rights treaties behind the DDA. All four agreed that a mainstream education may not be available where the inclusion of a student impinged on the safety of other students and staff. Three implied that a further limit may arise when educational opportunities of other students are adversely affected.

Chief Justice Gleeson made the clear point that the *Purvis* case concerned a clash between competing rights: 'The present case illustrates that rights, recognised by international norms, or by domestic law, may conflict. In construing the Act, there is no warrant for an assumption that, in seeking to protect the rights of disabled pupils, Parliament intended to disregard Australia's obligations to protect the rights of other pupils' (para. [6]). Chief Justice Gleeson implied that school students – and, indeed, staff – have a right to safety which school administrators have a duty to protect. He questioned whether Parliament is constitutionally entitled to enact legislation which does not allow competing rights to be reconciled:

> …a contention that the legislative power of the Commonwealth Parliament extends to obliging State educational authorities to accept, or continue to accommodate, pupils whose conduct is a serious threat to the safety of other pupils, or staff, or school property, would require careful scrutiny (para. [6]).

Justices McHugh and Kirby, like Chief Justice Gleeson, found that 'the Act provides for a balance to be struck between the rights of the disabled child and those of other pupils and, for that matter, teaching staff' (para. [123]). Like Chief Justice Gleeson, they found that a limit on the right to inclusion of students with disabilities would arise when the safety of others was put at risk: 'The nature of the detriment likely to be suffered by *any persons concerned*, if the student was admitted, would comprehend consideration of threats to the safety and welfare of other pupils, teachers and aides' (para. [123]). Arguably, however, they implied a further limit by stating that 'any negative impact that may be caused by the presence of a student with disability in a mainstream class is a proper matter to be considered when making a decision on whether that individual student can be admitted' (para. [123]). The vague phrase 'any negative impact' may be broad enough, for example, to encompass an adverse impact on the educational opportunities of others in a classroom.

Justice Callinan was prepared to make explicit the limit implied by Justices McHugh and Kirby. Citing the *International Covenant on Economic, Social and Cultural Rights*, he found that any right to inclusion of students with a disability must be weighed against the 'the right of everyone to education' (para. [238]). That universal right, he found, 'could be adversely affected by an insistence that the education to which a disabled person is equally entitled should be provided in circumstances which cause disruption to the education of others' (para. [238]). Justice Callinan was also concerned that the right to safety of others must be paramount. Emphasising the 'quasi-criminal' nature of Daniel Hoggan's behaviour, he, like Chief Justice Gleeson, cast doubt on the constitutional validity of legislation which would compel States to ignore State criminal laws by excusing or allowing violent behaviour, even when caused by disability, to continue to pose a threat to others (paras. [266], [271]).

*Purvis* and strategies for exclusion

To support their dismissal of Daniel Hoggan's claim of direct discrimination flowing from his exclusion, the majority judges developed controversial tests for proof of less favourable treatment and causation which allow the impact of disability related problem behaviour to be considered. There is little doubt that they were influenced in their reasoning by the absence in the DDA, as it then was drafted, of the availability of the unjustifiable hardship exemption post enrolment (Dickson, 2005; Edwards, 2004; Rattigan, 2004). In earlier cases, such as *L*, *K* and

*P*, the unjustifiable hardship exemption had been relied on to render prima facie direct discrimination lawful (Dickson, 2004).

The majority judges were also, clearly, influenced by a perceived need to construe the Act to deliver an interpretation which allowed for 'a proper intersection between the operation of the Act [*DDA*] and the operation of State and Federal criminal law'(para. [227] per Justices Gummow, Hayne and Heydon.):

> Daniel's actions constituted assaults. It is neither necessary nor appropriate to decide whether he could or would have been held criminally responsible for them. It is enough to recognise that there will be cases where criminal conduct for which the perpetrator would be held criminally responsible could be seen to have occurred as a result of some disorder, illness or disease. It follows that there can be cases in which the perpetrator could be said to suffer a disability within the meaning of the Act (para. [227] per Justices Gummow, Hayne and Heydon).
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> It would be a startling result if the Act, on its proper construction, did not permit an employer, educational authority, or other person subject to the Act to require, as a universal rule, that employees and pupils comply with the criminal law (para. [228] per Justices Gummow, Hayne and Heydon).

*Purvis and the 'comparator'*

Proof of direct discrimination requires a comparison between the treatment of the complainant with disability and the treatment of a 'comparator' person without the disability in order to determine whether the complainant has been treated 'less favourably' (DDA s. 5). Complainants and respondents have argued diametrically opposed interpretations of the 'identity' of the notional comparator. In the context of impairments which cause problem behaviours which impact on others, the question is not only poignant but crucial to the outcome of the case. In *Purvis*, as well as in earlier cases such as *L*, *P* and *K*, the complainants argued that the appropriate comparator is a person without the impairment and without the impairment induced behaviour. If the comparison is between the treatment of the person with the problem behaviour and the treatment of a person without it then it is obviously easier to prove 'less favourable treatment' because it could only rarely be proved that a person without the behaviour would have been disciplined or excluded in the same manner as the complainant. Respondents in those cases argued that the appropriate comparator is a person without the impairment but with the behaviour. When the behaviour is common to complainant and comparator it is obviously easier to rebut any allegation of discrimination as it could only rarely

be proved that the comparator would *not* have been disciplined or excluded in the same manner as the complainant. The decision of the High Court in *Purvis* appears to have settled the answer to the comparator question: the appropriate comparator is a person *without* the complainant's impairment but *with* the complainant's behaviour, even though the complainant's behaviour is a manifestation of and caused by disability. Because the 'normal' comparator who 'misbehaves' would be sanctioned, it is appropriate that the complainant be sanctioned, and, as such, there is no less favourable treatment (para. [12] per Chief Justice Gleeson, per Justices Gummow, Hayne and Heydon, para. [222]). The majority approach in *Purvis* at the time was directly at odds with the view taken by the minority, by earlier benches of the High Court (see, for example, *IW*, p.33 per Justice Toohey, pp 40-1 per Justice Gummow, p.67 per Justice Kirby), and by assorted anti-discrimination tribunals (See, e.g., *L, K* and *P*). Moreover, allowing the unwilled acts of the complainant to be compared with the willed violence of a person without disability must understandably be offensive to those with disabilities and their supporters. The *Purvis* approach to the comparator issue remains the law, however, and, as discussed, below, has been readily applied in later cases involving disability related problem behaviour.

*Purvis and causation*

Discrimination must be causally related to a protected attribute before it will be unlawful. The DDA prohibits, for example, discrimination 'because of' disability (ss. 5, 6). In *Purvis*, each of the judgments identified causation as an issue relevant to liability (paras. [12]-[13] per Chief Justice Gleeson, para. [166] per Justices McHugh and Kirby, para. [236] per Justices Gummow, Hayne and Heydon, paras. [267]-[270] per Justice Callinan). Justices across the minority and the majority accepted that it was necessary to look at 'why' or the 'real reason' the relevant treatment had occurred. Even though there was significant agreement between the judges as to the relevant test, the minority and majority could reach different conclusions because of the different way they read 'disability'. The minority justices would not have authorised a separation of the behavioural manifestations from the underpinning disability, and exclusion because of Daniel's behaviour, they found, was exclusion because of his disability. As with their treatment of the comparator issue, however, the majority justices could comfortably separate the behavioural manifestations of the disability for the purpose of working out the cause of the treatment. In their view, the legitimate answer to the question, 'why was Daniel Hoggan expelled?', would have been a 'lawful' reason: 'because of his behaviour'.

The judgment of Chief Justice Gleeson exemplifies the majority conclusion: 'The expressed and genuine basis of the principal's decision [to exclude Daniel] was the danger to other pupils and staff constituted by the pupil's violent conduct, and the principal's responsibilities towards those people' (para. [13]). His Honour's judgment, however, arguably goes further than any of the other judgments in *Purvis* in its potential to protect a school seeking to exclude a student with disability related problem behaviour. While his 'true basis' test for causation is superficially similar to that expounded by other members of the Court, upon closer reading Chief Justice Gleeson places much more emphasis on a subjective enquiry into the thought processes of the alleged discriminator and, particularly, into the express reasons for the treatment offered by the alleged discriminator. It is true that the analyses offered by Justices Gummow, Hayne, Heydon, McHugh and Kirby suggest that there is an element of subjectivity involved in the causation enquiry, to the extent, at least, that the reason for the treatment is a question of fact. Chief Justice Gleeson, however, went further in his analysis implying that there is no room, on the particular facts of *Purvis* at least, for any objective analysis of the motivation of the alleged discriminator: 'There is no reason for rejecting the principal's statement of the basis of his decision as being the violent conduct of the pupil, and his concern for the safety of other pupils and staff members' (para. [14]).

The judgment of Chief Justice Gleeson suggests that the explanation offered by the alleged discriminator is simply to be accepted as the reason for his actions. Indeed, his Honour says that it would be 'unfair' to the principal of South Grafton State High School to find a discriminatory 'basis' for his decision: 'It is not incompatible with the legislative scheme to identify the basis of the principal's decision as that which he expressed. On the contrary, to identify the pupil's disability as the basis of the decision would be unfair to the principal and to the first respondent [the State of New South Wales]' (para. [14]). While Chief Justice Gleeson concedes that from the point of view of Daniel Hoggan it may be reasonable to believe that he was expelled 'because of' his disability, his Honour stresses that, as it was the lawfulness of the *principal's* actions that was in question, it was *his* point of view which was relevant to the enquiry (para. [13]).

Allowing an exclusively subjective enquiry such as this into the reasons advanced by the alleged discriminator is potentially dangerous in that it encourages the unscrupulous invention

of 'authorised' reasons for acting. As such, Chief Justice Gleeson'sreading of causation would inevitably mean less pressure on institutions and individuals to accommodate people with disabilities. The unscrupulous school administration, for example, could escape liability simply by asserting that it was a student's 'truancy', not his or her impairment, that was the 'basis' of a decision to exclude (See, e.g., *BI* for a case concerning disability related non-attendance). Upon the analysis of Chief Justice Gleeson there is no need to evaluate, objectively, the reasons advanced for the 'truancy', no need, even, to enquire whether the 'truancy' was an incidence of the student's impairment. Further, the unscrupulous school could be encouraged to manufacture a misleading document trail which supported the stated reason for exclusion.

## ***Purvis*** **applied**

Later courts and tribunals considering disability discrimination in education cases were quick to adopt the majority approach in *Purvis* to both the comparator issue and causation. In *Tyler*, a 2006 DDA case, Federal Magistrate Driver , of the then Federal Magistrates Court (since 2014, the Federal Circuit Court), found that the temporary exclusion of a student with Down's syndrome, who had, allegedly, thrown an object from a balcony which hit a teacher, was not discriminatory. There were problems with proof of a link between the disability of the complainant and his behaviour with Federal Magistrate Driver noting that, 'while there is clearly evidence that Joseph presented with behavioural difficulties, I have no medical evidence at all that these were a consequence of his Down's syndrome' (para. [105]). Nevertheless, the decision arguably extends the scope of *Purvis* beyond the context of students proved to be violent to apply to students who simply stand accused of being violent. Although Federal Magistrate Driver refused to find that the complainant had thrown the object or even that he was 'involved' in the throwing incident (para. [105]), he found that a comparator without the complainant's disability but similarly standing accused of throwing would also have been temporarily excluded (para. [107]). The 'subjective' approach of Chief Justice Gleeson to causation was also influential in this case. Federal Magistrate Driver simply accepted the reason advanced by the principal of the school as the operative reason for the suspension:

> …it is clear from the evidence of Rabbi Spielman [the principal], which I accept, that he took his action not because of any concern about a behavioural consequence of Joseph's disability, but rather because of his concern about the College's duty of care

> to its teachers and its students (including Joseph). Rabbi Spielman was seriously concerned, after the alleged throwing incident, that the College might breach its duty of care if it did not take immediate action (para. [105]).

His honour, like the majority of the High Court, was impressed by duty of care issues and found that '[i]t would have been irresponsible for Rabbi Spielman [the principal] to have taken no action as that would have exposed the College to substantial risk' (para. [105]).

The majority approach in *Purvis* was also quickly applied in an education case beyond the context of the *DDA*. In 2004, the Victorian Civil and Administrative Tribunal relied on it to defeat a claim of discrimination made under the *Equal Opportunity Act 1995* (Vic) by a student with problem behaviour linked to his disabilities. In *Zygorodimos* the plaintiff student had been shifted to a different class in response to his behaviour problems and the stress they caused his teacher. He had not exhibited 'violence' of the kind complained of in *Purvis* but had nevertheless been 'difficult' (para. [49]). He had, among other misdemeanours, thrown tantrums, been inattentive, put 'inappropriate objects' in his mouth, and run from the classroom. This case demonstrates not only a willingness to apply the majority approach in a less 'dangerous' context than that postulated in *Purvis*, but also in the context of state legislation where the availability of other exemptions (In *Zygorodimos*, relevantly, *Equal Opportunity Act 1995* (Vic) s 39, special services or facilities exception) would have already, perhaps, allowed an 'out' to a court keen to authorize the apparently 'less favourable' treatment of a 'problem' complainant. It is of further interest that the Tribunal refused to consider evidence of other 'circumstances' asserted by the complainant to be relevant to his treatment. This evidence may have brought into issue the appropriateness of the school's response to the complainant's behaviour:

> Before leaving this claim I should add that Mr Gray, counsel for Ben, relied on various matters which he said I should take into account to formulate the proper comparator. These included provisions concerning disciplinary policies of state schools in the Education Regulations 2000, the absence of a provision for the transfer of a child from one class to another in VCD's code of student conduct, and views expressed by some of the witnesses, such as the education expert Professor Branson, about when it would be appropriate to transfer a child for behavioural reasons from one class to another. While this evidence may be appropriate in general terms in dealing with the challenging behaviour of children, the only evidence which, in my view, is relevant to the proper comparator here, is how Dr Pearce would have treated a child other than Ben without epilepsy, but with similar behaviour [para. [100]).

**Law reform after *Purvis***

The DDA was amended, after and in response to *Purvis*, in 2009, to make it plain that a disability included its manifestations (DDA s. 4) (See *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth)). This amendment, however, delivers little practical benefit in respect of the application of the DDA because of the way the comparator and causation tests were settled in *Purvis*. While the problematic manifestations of the disability are allowed to be separated from the underlying disability, direct discrimination will remain difficult, if not impossible, to prove. In the same suite of amendments, the unjustifiable hardship exemption was made available post-enrolment. While this amendment was too late to counter the impact of the High Court's construction of the comparator and causation tests in *Purvis*, its impact on proof of unlawful discrimination is addressed, below.

The 2009 amendments also imposed an express obligation to make reasonable adjustment (DDA ss. 5 and 6) in response to the finding of the High Court in *Purvis* that an implied obligation could not be drawn from the text of the DDA (See *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) ss 13-17). That obligation, in the education context, is now enshrined in the DSE which were implemented in 2005 and which are also considered below.

**Indirect discrimination**

Indirect discrimination (DDA s. 6) potentially occurs if a condition, often implied but sometimes express, is imposed on a group. It may be discriminatory if a person with disability is unable to 'comply' with that condition, and the effect is that the condition causes disadvantage to him or her. It will be discriminatory, if the condition is then not proven to be reasonable. It was suggested by Chief Justice Gleeson in *Purvis* that Daniel Hoggan's case was not framed as one of indirect discrimination in order to avoid the reasonableness enquiry (para. [3]). It is instructive to compare how the reasonableness issue has been dealt with in cases similar to that of Daniel Hoggan, but formulated as indirect discrimination claims. The New South Wales Administrative Decisions Tribunal (NSWADT) case of *M&C*, and the *DDA* case, *Minns*, both involved allegations of indirect discrimination against students with Attention Deficit Hyperactivity Disorder (ADHD).

Both M, of *M&C*, and Ryan Minns were frequently disciplined for breaches of the school rules. In *Minns*, Federal Magistrate Raphael explicitly drew attention to the similarities between that case and the *Purvis* case commenting that the consequence of Daniel Hoggan's disability was 'violent and anti-social behaviour very similar to that exhibited by Ryan Minns' (para. [191]).

Both the NSWADT and Federal Magistrate Raphael emphasised that it was reasonable that schools have and enforce codes of conduct. Indeed, the NSWADT found the point so 'trite' that it required 'no further discussion' (para. [123]). Federal Magistrate Raphael determined that such codes were necessary to enable 'all students to benefit from the educational opportunities offered and the requirement to allow this to happen in a safe environment' (para. [247]).

The issue in both cases, however, was not the reasonableness of the *code*, per se, but the reasonableness of the required *compliance* with the code imposed on the complainants who alleged that their impairment prevented such compliance. The evidence of M's mother, in *M&C*, was that M 'simply was not capable of controlling her behaviour' (para. [117]). The complainant's case in *Minns*, disputed by the respondent, was that Ryan's impairment made it 'impossible for him to behave in a manner compliant with the discipline policy' (para. [250]).

The NSWADT found against M on a technical issue and her case failed (See Dickson (2004) for further detail). The Tribunal was nevertheless critical of the inflexible administration of discipline policy at both schools which M attended. Whilst there was considerable discretion as to which penalty was meted out, there was no discretion to give no penalty at all. The Tribunal characterised the slavish adherence to the discipline policy as 'unreasonable':

> While such behaviour [physical aggression] is clearly unacceptable, and it is reasonable to require that such children [children with ADHD] respect others and their property, it seems to us that it is unreasonable to apply a disciplinary regime in blanket fashion to all children regardless of their subjective features (para. [131]).

The Tribunal compared the inflexible application of the discipline code with a mandatory sentencing regime, 'a form of punishment and social control, which has been shown to be largely ineffective in modifying the conduct of people with significant psychiatric or psychological difficulties' (para. [135]).

The Tribunal also emphasised that it was not reasonable to expect a child such as M to comply with the policy unless she had 'special support to enable…her to do so' (para. [131]). The facts, here, were that M did not have this 'special support'. Thus, the Tribunal found a clear causal link between the lack of support and M's failure to comply with the discipline code:

> Not only was M an ADD sufferer, she was well behind her colleagues academically…In those circumstances, it was unreasonable to expect that she could significantly modify her behaviour as a result of being frequently disciplined in the absence of that attention, support and special care. It was in our view therefore unreasonable to punish her in the same fashion as any other member of the student body if she failed to comply with the requirements of the Code (para. [133]).

The Tribunal's reasoning here is similar to the reasoning of Commissioner Innes at first instance in the HREOC hearing of the *Purvis* case. Commissioner Innes found that the South Grafton High School had not taken reasonable steps to accommodate Daniel Hoggan's impairment and that this failure had contributed to his behaviour problems. Ultimately this analysis of the evidence was rejected by the majority in *Purvis*. The cynical view, however, is that the Tribunal only made its pointed criticism of the respondent because having already found against M, it could safely admonish the respondent without actually having to enforce, controversially, any improvement in the respondent's treatment of its students.

The facts of the *Minns* case differed from the facts of *M&C* in that there was not the same weight of evidence of lack of specialist support for Ryan. In addition, there was evidence that the school had administered the discipline policy flexibly to accommodate Ryan's impairment. It should also be noted that Ryan and his mother objected to Ryan's taking prescribed medication which may have modified his behaviour. Nevertheless, the complainant argued, along the lines of *M&C* that the respondent had failed to take reasonable steps to deal with Ryan. The complainant suggested alternative methods of management of Ryan's behaviour. The Court was not convinced, however, that this line of argument was relevant (para. [256]) and found that the complainant had not proved that the requirement that Ryan comply with the code was 'not reasonable':

> I am of the view that the requirement that was placed upon Ryan to comply with each of the school's disciplinary policies as modified was reasonable in all the circumstances. The classes in which Ryan was placed would be unable to function if he could not be removed for disruptive behaviour. The students could not achieve their potential if most of the teachers' time was taken up with handling Ryan. The playgrounds would not be safe if Ryan was allowed free rein for his aggressive actions. Therefore the claim for indirect discrimination must fail in the manner in which it is put' (para. [263]).

Thus, in determining the reasonableness issue against Ryan Minns, Federal Magistrate Raphael balanced the benefit to Ryan in allowing him 'free rein' against the potential detriment to others in the school community and Ryan's interests yielded to the interests of the majority. His language is clearly reminiscent of the language of Chief Justice Gleeson (paras. [11]-[14]) and Justice Callinan (para. [266]) in the High Court in *Purvis* who were so concerned about the detriment to others in the South Grafton State High School community should Daniel Hoggan's enrolment be maintained. There seems little doubt that, had the *Purvis* claim been framed as one of indirect discrimination, alleging that Daniel could not comply with a condition that he comply with the school's discipline code, it would have stumbled upon proof that the condition was not reasonable.

**The Unjustifiable Hardship Exemption**

Proof that avoiding discrimination of a student with disability related problem behaviour would cause unjustifiable hardship to the discriminator will render a prima facie case of discrimination lawful (see, e.g. DDA s 29A). In the DDA, pursuant to s. 11, the hardship enquiry will consider the 'effect' of the disability, and the impact of inclusion for 'any person concerned', balancing the 'benefit' that flows from inclusion against the 'detriment' – the education and social benefits for all students, for example, of an inclusive school against the risk of danger or disruption that the inclusion causes. The cost of avoiding the discrimination and the financial resources of the discriminator – the education institution – are also relevant.

As noted above, when Daniel Hoggan was excluded from his mainstream school, the unjustifiable hardship exemption was not available to schools after the point of enrolment. As such, there was no sign-posted legislative method of authorising Daniel's exclusion. When the comparator question had arisen in the context of other anti-discrimination legislation, most notably in the ADAQ cases, *L*, *P* and *K*, tribunals could allow a reading which accorded respect to prevailing disability theory, and, arguably, to the object of the anti-discrimination legislation of protecting against 'unfair' discrimination (See, e.g., DDA s 3, ADAQ long title), because they could rely on the unjustifiable hardship exemption to legitimise the removal of the problem student. In the ADAQ cases there was no pressure on the QADT to separate behaviour from impairment for the purpose of making a comparison, as a more direct route to finding no compensable discrimination was available. The QADT could accommodate the arguments of

both complainant and respondent in that they could find both that discrimination had occurred and that it was not unlawful. The Queensland legislation, as interpreted by the QADT, allowed the Tribunal to make at least a 'show' of understanding the discrimination suffered by the complainant. While it must be conceded that it is doubtful that this 'show' delivered any more comfort to the complainants in *L*, *K* and *P*, than the outright denial of discrimination delivered by the High Court to Daniel Hoggan, it can be concluded that the ADAQ, as interpreted by the QADT, allowed, then, a more honest weighing of competing considerations than the DDA as manipulated by the majority in *Purvis*, while still balancing minority and majority rights and delivering a 'fair' decision.

Unjustifiable hardship and 'cost'

It can be argued that if enough support – support which may well be expensive – were made available many more students could be placed in mainstream schools. In the *Purvis* case, for example, the minority justices found that more could have been done to support the inclusion of Daniel Hoggan (paras. [106]-[107]). In cases such as *L* (p. 17) and *P* (p. 787) it was also clear from the facts that more teacher aide and specialist teacher support would have reduced both the stress to staff and the disruption to the learning environment which accompanied the inclusion of the complainants.

The link between the spending of money on resources, on the one hand, and the avoidance of threats to safety and of disruption of the learning environment, on the other, was made plain, however, in the case of *K*. In that case the Tribunal conceded that K 'could be properly educated in a regular classroom setting' (p. 623) but that the provision of resources by the school needed to facilitate her inclusion at the respondent independent school would have caused unjustifiable financial hardship (p. 623). More recent cases have indicated that the cost of supporting a student with disability, and particularly of the one-on-one support that may mitigate the impact of problem behaviour on other students and on staff, may amount to unjustifiable hardship even for state run schools. In *Sievwright*, for example, Justice Marshall cited Chief Justice Gleeson in *Purvis* (para. [7]) in making the point that, '[t]he obligations of the State in respect of individual children must be considered alongside the wider legal responsibilities which teachers and administrators owe to all students' (para. [207]). Allocation of one on one support to students such as Sievwright would have required a doubling of the

disability support budget for the state of Victoria and, by implication, directed already scarce resources away from other priorities (para. [109]).

**Disability Standards for Education 2005 (Cth)**

The High Court in *Purvis*, both minority and majority justices, rejected the complainant's contention that the DDA imposed upon institutions such as schools an implied duty to make 'reasonable accommodation' for people with disabilities. Before *Purvis*, it had been generally accepted that there was such a duty (see Dickson, 2006). The minority justices found on the facts that the school had failed to do enough to support Daniel and that as a result he was treated less favourably. The majority justices, of course, focussed on Daniel's behaviour rather than on the way the school supported, or failed to support him.

When the DSE came into force in 2005, they fixed the 'problem' of the missing obligation under the DDA to the extent that they do impose on education institutions an obligation to make 'reasonable adjustment' for students with disability across a range of aspects of school life: enrolment, participation, curriculum and student support. As noted, above, the DDA was then amended in 2009 to impose an obligation to make reasonable adjustment across a range of protected areas, including education. This was done both to remove any doubt about the legality of the obligation in the DSE, absent authority in the DDA (see DSE s 1.6; Dickson, 2014), and to shift the burden of compliance with the DDA away from a complaints based mechanism driven by disaffected students, towards a positive institutional obligation to take action to remove discriminatory policies and practices (Dickson, 2006).

A clear benefit of the DSE for all students with disability is that they mandate consultation with the student and, where appropriate, the student's parents or guardians, about the support they see as necessary to effect inclusion at a mainstream school. Consultation must occur at the point of enrolment (s. 4.2(3)), and during enrolment at a school (ss. 5.2(3), 6.2(3), 7.2(7). To discharge its obligations under the DDA, a school must consider what adjustments may be necessary to support a student's enrolment as an integral part of working out whether those adjustments are reasonable. Rejecting an enrolment without first considering reasonable adjustment exposes a school to allegations both of breach of the DSE (DDA s. 32) and of direct discrimination under the DDA (s. 5).

There are immediately apparent problems with the DSE, however, as they apply to students with disability related problem behaviour. First, it is implicit in the obligation to make

reasonable adjustments, that 'unreasonable' adjustments will not be required. adjustments are obliged only if 'reasonable'. The same sorts of matters as are relevant here as to proof of reasonableness in respect of indirect discrimination. Further, the unjustifiable hardship exemption will excuse a school from making even a reasonable adjustment (DSE s.10). The same sorts of considerations relevant to proof of unjustifiable hardship in the DDA will apply in respect of the subordinate DSE as the DSE imports the definition of unjustifiable hardship from the DDA (s.10 note). This scheme sets up a very thick set of limits on any adjustments which may support inclusion (Dickson, 2014). The effect of including a disruptive or dangerous student on others in the school community and the cost of supporting his or her enrolment will be relevant to both reasonableness (s. 3.4(2)) and hardship (DDA s 11). The capacity to pay for expensive adjustments is relevant to hardship (DDA s 11).

Two of the few Federal Court cases to date which have interpreted and applied the DSE, *Walker* and *Abela*, concerned students with problem behaviour. In both cases, a *Purvis* style analysis of proof of less favourable treatment and causation was applied: there was no less favourable treatment of the complainant because a student without his disability, but with his problem behaviour would also have been excluded; there was no causal link between the disability and the treatment because its 'true basis' was concerns about safety concern not the student's disability. Further, in both cases there was no reasonable adjustment identified which may have mitigated the behaviour and contained its impact on the school community and which had not been made available. Since the *DSE* were introduced, it may be incumbent upon education providers to demonstrate attempts to accommodate problem behaviour via adjustments such as individual aide support and withdrawal from settings which may stimulate or aggravate the problem behaviour. However, the facts of *Walker* and *Abela* suggest that there may be situations where adjustments cannot remove, or even reduce to an acceptable level, the risk of harm posed by the enrolment of the student with the disability related problem behaviour.

## Conclusion

It is clear from the decided cases that many students with behavioural and intellectual impairments are guaranteed fewer educational opportunities than students with other impairments or without impairments. These students have fewer opportunities principally because their inclusion in the mainstream class room is perceived to interfere with majority rights. Some commentators have suggested that the problem is community 'intolerance' rather

than individual 'interference' and that all that is required to effect full inclusion of students with impairments is a change of 'attitude' on the part of staff and students (Christensen, 1996; Slee, 2008). The courts, however, have been concerned by what they regard as tangible threats to community safety and to the viability of the learning environment posed by students who cannot, because of impairment, conform to school rules and standards of behaviour.

It is to be hoped, however, that the regime of limitations acknowledged and constructed by Australian courts and tribunals does not permit education institutions in Australia to avoid making adjustments that would allow schools to operate more inclusively. While uncontrollable violence cannot be neutralised, that situation should be distinguished from the situation where a student reacts 'violently' to an inflexible and unsympathetic environment. Anti-discrimination legislation, such as the DDA, aims to eliminate discrimination 'as far as possible' (DDA s. 3) acknowledging that sometimes discrimination will be lawful where it is fair to allow it. Care must be taken, however, that discrimination which is not 'fair', but which is simply 'convenient' or 'expedient' or 'cost effective', is not allowed to flourish under an inflexible and unsympathetic regime which accords more respect to the letter of the law than to the interests of people with impairments.

## Notes

[1] It is acknowledged that 'inclusion' is a contested term in the context of the education of students with disability. Analysis of the meaning of the term is beyond the scope of this chapter. For the purpose of this chapter, 'inclusion' is used by the author to mean full time enrolment at a mainstream school which also enrols students without disability.

[2] Cases are referred to by their abbreviated names throughout this chapter. For the full citation of the case "*P*", and the full citations other cases referred to by their abbreviated names in the chapter, please see the case list at the end of the chapter.

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